

E-FILED on 8/8/07

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re CONSECO INSURANCE CO.
ANNUITY MARKETING & SALES
PRACTICES LITIG.,

No. C-05-04726 RMW

This document relates to:

ALL ACTIONS

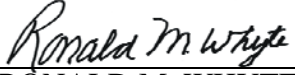
ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS SECOND
AMENDED COMPLAINT

[Re Docket No. 88]

Defendant Conseco Insurance Company ("CIC") moves to dismiss all causes of action in the second amended complaint. The parties appeared for oral argument before the court on August 3, 2007. After considering the papers and argument of counsel, the court denies CIC's motion to dismiss except as to plaintiff's sixth claim for breach of fiduciary duty and seventh claim for aiding and abetting breach of fiduciary duty. Although the second amended complaint alleges, *inter alia*, that defendants trained individual sales agents to target senior citizens by publicizing financial and estate planning services at seminars and community service events for the elderly, SAC ¶¶ 26, 28, plaintiff's allegations do not establish how the defendants are responsible for any fiduciary duty that may exist between plaintiff and Zehner. Further, the court does not find that the statement set forth in CIC's marketing materials welcoming plaintiff to the annuity is alone sufficient to establish a

1 fiduciary duty directly between plaintiff and the defendants. Claims six and seven are dismissed
2 with leave to amend. Plaintiff shall have 20 days from the date of this order to amend his complaint.

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5 DATED: 8/7/07



RONALD M. WHYTE
United States District Judge

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United States District Court
For the Northern District of California

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20 **Dated:** 8/8/07

/s/ MAG
Chambers of Judge Whyte